Supreme Court, U.S.
FILED

02 266 AUG 19 2002

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No. _____

In the Supreme Court of the United States

PROJECT CONTROL SERVICES, INC.,
Petitioner,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Small Businesses and Woman-owned small businesses are third party beneficiaries of large multibillion dollar federal government contracts performed by large businesses and subject to the Small Business Act

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Project Control Services, Inc., a woman-owned small business concern incorporated in the state of Georgia and residing in the Middle District of Georgia. Petitioner has no corporate affiliations. Project Control Services, Inc. was the Plaintiff in the District Court, and the Appellant in the Fourth Circuit Court of Appeals.

Respondent

The Westinghouse Savannah River Company is a corporation and wholly-owned subsidiary of Westinghouse Government Services Company, L.L.C., who is a wholly-owned subsidiary of Washington Group International, Inc. Respondent Westinghouse Savannah River Company was the Defendant in the District Court, and the Appellee before the Fourth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fourth Circuit Opinion (Appendix A at 1a) is reported at 35 Fed. Appx. 359, 2002 WL 1020695 (4th Cir. 2002). The District Court opinion is unpublished (Appendix B at 13a). The District Court Opinion references, as a basis for its decision, "WESTINGHOUSE SAVANNAH RIVER COMPANY'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO ALL CLAIMS" (Appendix C at 21a).

STATEMENT OF JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on May 21, 2002. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the following statutory and regulatory provisions:

A. 15 U.S.C. § 637(d) of the Small Business Act which, among other requirements, states:
(1) That a Prime Contractor receiving a large Government Contract award is required to propose and perform a small business subcontracting plan;
(2) That certain mandatory language from the law is required to be incorporated in the

prime contract and the subcontracting plan to include that small businesses and woman-owned small businesses shall have the maximum practicable opportunity to compete for subcontract awards and that the prime contractor shall adopt procedures to ensure the timely payment of small business and woman-owned small business subcontractors;

(3) The definitions that determine exactly which business are considered to be small businesses and woman-owned small businesses for purposes of the Act;

(4) And reiterates the congressional policy announced in 15 U.S.C. § 631a that small businesses and woman-owned small businesses are vital to the nation's economic well-being and that congressional policy is to ensure that small businesses and woman-owned small businesses are encouraged to grow and prosper, receive timely payment for work performed and receive a fair proportion of contract awards.

B. 48 C.F.R. § 19.702 (1996) implements the statutory directives of 15 U.S.C. § 637(d) and requires Government Agencies to require Large Prime Contractors to provide, agree to and adopt these subcontracting plans incorporating the requirements of the statute.

C. 13 C.F.R. § 121.1001 (1996) in the Small Business Administration Regulations provides a procedure whereby small businesses, woman-owned small businesses and certain other interested parties may protest the small

> business size representation of another offeror competing for a small business or woman-owned small business procurement to ensure that only small businesses or woman-owned small businesses obtain awards for procurements exclusively set aside for them by large business prime contractors.

15 U.S.C.§ 637(d) provides that it "is the policy of the United States that small business. . . and small business concerns owned and controlled by women, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts ... It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns. . . and small business concerns owned and controlled by women." 15 U.S.C. § 637(d)(2-3) requires the government to include a contract clause stating all these promises are included "in all contracts let by any Federal agency" except for limited instances not applicable to this case. 15 U.S.C. § 637(d)(4)B)(iv) requires each large prime contractor to "negotiate with the procurement authority a subcontracting plan" which incorporates, among other requirements, the above requirements. 15 U.S.C. § 637(d)(3)(C) states that "the term 'small business concern' shall mean a small business as defined pursuant to section 3 of the Small Business Act. . . " 15 U.S.C. § 637(d)(3)(D) defines the term "small business concern owned and controlled by women". Both 15 U.S.C. § 637(d)(8) and 48 C.F.R. § 19.702(c) provide that "any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its subcontract. . ."

48 C.F.R. § 19.702 (1996) reiterates the Policy of the United States that all large Government prime contractors must agree in their prime contracts that "small business concerns ... and women-owned small business concerns will have the maximum practicable opportunity to participate in contract performance ... and establish procedures to ensure the timely payments of amounts due pursuant to the terms of their subcontracts. . ." 48 C.F.R. § 19.702(a)(1996) provides that "Section 8(d) of the Small Business Act (15 U.S.C. § 637(d)) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans ..."

13 C.F.R. § 121.1001(a)(3)(1996) provides that "For SBA's Subcontracting Program, the following entities may protest [in connection with a procurement]: . . . Other potential subcontractors. . . " The regulation permits small business subcontractors to challenge the representations of other small business subcontractors to make sure that only small businesses receive the benefits of the statutory preference for small businesses.

STATEMENT OF THE CASE

The Westinghouse Savannah River Company ("WSRC") is a large business that earns over $1 billion per year operating the Savannah River Site for the Department of Energy. Pursuant to that contract, WSRC negotiated and agreed to a subcontracting plan and other contract provisions incorporating the requirements of the Small Business Act. The federal government reimburses all of WSRC's allowable costs under this cost reimbursable contract.

Project Control Services, Inc. is a small business concern and a small business concern owned and controlled

by a woman. The owner of the company is Ms. Audrey Dye Peel who is assisted in the operation of her company by her husband, Mr. T. Edward Peel. Ms. Peel's company is incorporated in the state of Georgia with its main office in Augusta, Georgia, across the Savannah River from the Savannah River Site. Ms. Peel founded Project Control 12 years ago and the company grew to 25 employees at its height. The company recruits, retains and trains professional employees that perform scheduling, cost estimating and cost engineering for large, complex projects. Before the lawsuit, Project Control had been supplying these professionals for nine years to WSRC which represented 90% of its business.

Due to its expertise, Project Control Services, Inc. was awarded a subcontract from WSRC as the only source and received another subcontract in a procurement which had been set aside exclusively for small businesses. The quality of Project Control, Inc.'s work was excellent as it always completed its work satisfactorily without complaint. These subcontracts were subject to audit to either negotiate the price of the contract or to verify the costs for cost reimbursable subcontracts.

Ms. Peel is not an accountant. Her rudimentary accounting system was approved by WSRC and another WSRC subcontractor. For the subcontracts at issue, WSRC failed to timely perform the audits as the audit to negotiate the price of one contract was not started until the contract had been partially performed and the cost reimbursable contract audit was not started until after the base period and two option years were complete. A dispute arose regarding whether the audit was performed properly. The WSRC auditor chose to secretly refer Project Control Services, Inc. for a criminal investigation rather than personally follow up with Project Control Services, Inc. to resolve the issues. The WSRC

auditors were not Certified Public Accountants nor were they supervised by Certified Public Accountants.

The result of WSRC's failed audit was that Project Control Services, Inc. was blacklisted from receiving any further DOE subcontracts at the Savannah River Site, Project Control Services, Inc.'s employees were hired away by WSRC to continue their work at the site, Project Control Services, Inc. was not paid for over one quarter of a million dollars worth of work that it had performed and Project Control Services, Inc.'s business was severely crippled by the loss of over 90% of its business.

The Defense Contract Audit Agency completed the audit and concluded, after exhaustive reviews and compilations of almost five years of cost records that the WSRC-approved Project Control Services, Inc.'s accounting system was inadequate to support these subcontracts. Project Control was partially paid the monies owed by WSRC, without interest, years after the work was completed. Small amounts are still owed today.

Just prior to the expiration of the last of its subcontracts with WSRC and the hiring away of the majority of its employees by WSRC, Project Control Services, Inc. filed suit against WSRC in the United States Federal District Court for the Middle District of Georgia. After the Court denied Project Control Services, Inc.'s request for injunctive relief, the case was transferred to WSRC's chosen subcontract venue, the Federal District Court for South Carolina in Aiken, South Carolina as provided in the lengthy WSRC-drafted subcontract form.

In its Amended and Supplemental Verified Complaint, Project Control Services, Inc. cited the numerous prime

contract provisions incorporating the Small Business Act requirements for Prime contractors contained at 15 U.S.C. § 637(d). Project Control Services, Inc. alleged that, as a small business and woman-owned small business, it was an intended third party beneficiary of these provisions and WSRC's subcontracting plan. Project Control Services, Inc. alleged that WSRC's actions had breached these provisions and that Project Control Services, Inc. was entitled to damages for WSRC's breach of this third party beneficiary contract.

WSRC moved for summary judgment before trial on the claims in the Complaint. WSRC argued that the test for determining whether a beneficiary was an intended or incidental beneficiary was set out in *Orchards v. United States*, 4 Cl.Ct. 601, 611 aff'd 749 F.2d 1571 (Fed. Cir. 1984) *cert. den.* 474 U.S. 818 (1985). *See* Appendix C at p. 30a. That decision provided a two part test whereby a beneficiary must show that the contract must reflect the intention of the parties to benefit the beneficiary and, secondly, the contract must intend to give the beneficiary the direct right to compensation and enforcement of the beneficiary's rights. The WSRC standard subcontract forms provided that the common law of federal government contracts would govern the subcontracts.

The Federal District Court granted WSRC's motion as to the third party beneficiary claims. It stated that the "court agrees with the arguments presented by WSRC. . . The court concludes that PCS was not an intended beneficiary of the contract between DOE and WSRC." *See* Appendix B at p. 20a. At trial, the court excluded evidence regarding WSRC's obligations under its prime contract towards small businesses and small business concerns owned and controlled by women such as Project Control Services, Inc. Instead, this contract dispute was treated as an ordinary business dispute. Although

this issue was raised on appeal, the Fourth Circuit did not address this issue in its decision which denied Project Control Services, Inc.'s appeal in total.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Fourth Circuit Conflicts with the Decision of Another Circuit.

As explained above, the District Court adopted the two part test for determining an intended beneficiary as outlined in *Orchard, id.* The second prong of the test provides that the contract must intend to give the beneficiary the direct right to compensation and enforcement of the beneficiary's rights. The second prong of the test has been roundly rejected in precedent of the Court of Appeals for the Federal Circuit. *US Ecology v. U.S.*, 245 F.3d 1352 (Fed. Cir. 2001); *Caguas Cent. Federal Sav. Bank v. U.S.*, 215 F.3d 1304 (Fed. Cir.) *cert. den.* 531 U.S. 1070 (2000); *State of Montana v. U.S.*, 124 F.3d 1269, 1273 (Fed. Cir. 1997); *Schuerman v. U.S.*, 30 Fed. Cl. 420, 427-434 (Fed. Cl. 1994). In *Montana, id.* at p. 1273, the Federal Circuit specifically refused to follow the second prong of the test.

There is no logical way to reconcile the split of authority between the Fourth Circuit and the Federal Circuit. The issue regarding this test is very significant. Small businesses, Woman owned small businesses and others have no way to enforce their rights provided under the Small Business Act and receive compensation when large businesses fail to honor their obligations to these small businesses. Although these businesses might not satisfy the second prong of the test, they clearly satisfy the first prong of the test.

II.

The Decision of the Fourth Circuit is Incorrect.

The Court of Federal Claims succinctly explained when the two prong test used in *Orchard, id* should be used when assessing a claim to third party beneficiary status:

> This is not a case where the Government entered into a contract for the benefit of the public at large and where two members of the public seeks to sue for breach of contract. Instead, this is a case where the Government specifically identified plaintiffs as the intended beneficiaries in the Contract of Guarantee, and it is upon this contract that plaintiffs are suing for breach.

Schuerman, id. at p. 433.

Likewise, here, the contract specifically identified which businesses were considered to be small business concerns and small business concerns owned and controlled by women in the subcontracting plan and the provisions of the prime contract. These provisions were not directed to benefit the public at large and Project Control Services, Inc. was not seeking to enforce these provisions as member of the public at large. Project Control Services, Inc. sought to enforce these provisions based on its status as a small business concern and small business concern owned and controlled by a woman - two classes of businesses specifically defined in the subcontract. Clearly, under the Federal Circuit test, Project Control Services, Inc. was an intended beneficiary of the WSRC prime contract and its third party beneficiary claims

should not have been summarily dismissed. Notably, the Small Business Administration regulations specifically provide small business concerns with the right to challenge the size representation of another small business for subcontract opportunities procured by prime contractors under their prime contracts subject to these statutory small business requirements. *See* 13 C.F.R. § 1001(a)(3). Project Control Services, Inc. reasonably relied on these benefits since they were incorporated by statute, regulation, contract provision and WSRC's subcontract plan.

III.

The Question Presented Is Important.

Congress unequivocally declared the importance of these third party rights when enacting the Small Business Act:

> For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary, consistent with its needs and obligations and other essential considerations of national policy, to implement and coordinate all Federal department, agency, and instrumentality policies, programs, and activities in order to: foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses; ... reduce the concentration of economic resources and expand competition;

> and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses.

15 U.S.C. § 631a.

The Fourth Circuit decision is contrary to the Congressional statement of national policy. It thwarts the intent of the statue and the specific benefits that Congress conferred on small businesses. The Fourth Circuit decision ignored the many pronouncements from the Federal Circuit regarding the common law of federal government contracts relating to third party beneficiary contracts. Allowing the Fourth Circuit decision to stand will permit large businesses, like WSRC, to evade their statutory, regulatory and contractual obligations to small businesses by merely forcing small businesses to agree to venue selection clauses forcing these businesses into courts in the Fourth Circuit. Project Control Services, Inc. was forced to sign such an onerous and long subcontract form drafted by WSRC which forced transfer of the lawsuit into the Fourth Circuit.

IV.

The Fourth Circuit Decision Adversely Impacts Small Businesses, a Protected Class that Congress Intended to Protect and Benefit by Enacting the Small Business Act.

In our society, the persons least able to protect themselves are members of protected classes. Large businesses operating under large federal government costs which reimburse all their costs, have many resources, and the abilities and resources to defend actions. In fact, while Project Control Services, Inc. pursued this litigation, the

federal government funded WSRC's legal expenses to bludgeon Project Control Services, Inc. into submission. Not only did WSRC fail to pay Project Control (and has never paid interest on the monies that it owed Project Control Services, Inc.), but Project Control Services, Inc. did not receive payment for complying with the audit or pursuing this litigation to get paid. Clearly, Congress never meant for a large business to use taxpayer funds to delay payment to a small business and all but destroy it. The Federal Circuit decisions are diametrically opposed to the Fourth Circuit decision. The Supreme Court needs to accept certiorari to vindicate the national policy supporting the American dream of owning one's own business. Allowing the Fourth Circuit decision to stand will cause the American dream to wither and die.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1352

[Filed May 21, 2002]

Project Control Services, Incorporated, *Plaintiff-Appellant,*	)
v.	)
Westinghouse Savannah River Company, Incorporated, *Defendant-Appellee.*	)

Appeal from the United States District Court for the District of South Carolina, at Aiken
Cameron McGowan Currie, District Judge.
(CA-98-3738-1-22)

Before WIDENER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge

OPINION

PER CURIAM

The present diversity action stems from a dispute between two companies that had a contractor/subcontractor relationship, which relationship was based upon numerous subcontracts between them. Westinghouse Savannah River Company (WSRC) was the contractor, and Project Control Services, Inc. (PCS) was the subcontractor. Under the subcontracts at issue, PCS performed employee scheduling and cost-estimating services for WSRC in connection with WSRC's management and operation of the United States Department of Energy's Savannah River Site (SRS).

The subcontracts at issue provided that PCS would be paid for its services on an interim basis using provisional rates, but that the parties would negotiate final rates after an audit, performed by WSRC, of PCS's accounting books and records. Depending upon the results of the negotiations, the final amount due PCS under the subcontracts at issue would be adjusted up or down. The final rates depended in large part on numerous cost elements allegedly incurred by PCS in performing the subcontracts at issue, for example, the cost to PCS to rent office space and the cost to PCS to employ office personnel.

The primary basis of the dispute between WSRC and PCS was the level of cooperation that each party exhibited when the time came for WSRC to audit PCS's accounting books and records. Each party accuses the other of acting unreasonably during the audit process, which process was eventually completed by the Defense Contract Audit Agency

(DCAA) due to the bad blood that had developed between the parties. Relevant to the present appeal, the DCAA audit did not resolve certain disputes between the parties regarding the appropriateness of the amounts of certain cost elements claimed by PCS. Moreover, PCS was not happy when WSRC refused to continue its contractor/subcontractor relationship with PCS at the expiration of the subcontracts at issue and hired some employees of PCS.

PCS ultimately brought the present diversity action against WSRC alleging numerous claims, including breach of subcontracts and intentional interference with economic relations. The district court granted summary judgment in favor of WSRC with respect to some of PCS's claims, granted WSRC's motion for judgment as a matter of law with respect to a portion of PCS's breach of subcontracts claim,[1] and allowed the remaining claims to go to the jury. Following a three week trial, the jury returned a verdict fully in favor of WSRC.

Furthermore, in order to resolve still disputed cost elements that needed to be resolved before the parties could agree upon the amounts that WSRC still owed PCS under the subcontracts at issue, the parties agreed to allow the jury to answer special interrogatories (the Special Interrogatories) regarding these disputed cost elements in what amounted to an accounting exercise. Based upon the jury's answers to the Special Interrogatories, the parties agreed that the final

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[1] In this regard, the district court granted WSRC's motion for judgment as a matter of law to the extent that PCS contended that WSRC breached an alleged contractual duty under a particular subcontract to provide PCS with WSRC personnel for training.

amount due PCS under the subcontracts at issue was $252,840.29. Because the jury had been instructed, with the consent of the parties, that it could find that WSRC still owed PCS money under the subcontracts at issue without finding that WSRC had breached the subcontracts at issue and the jury found that WSRC had not breached the subcontracts at issue, the district court did not make the $252,840.29 amount part of the final judgment.

On appeal, PCS alleges numerous errors by the district court, including, not making the $252,840.29 amount part of the final judgment and not awarding PCS pre and postjudgment interest on that amount. For reasons that follow, we affirm the final judgment of the district court *in toto*.

I.

In 1989, WSRC and the United States Department of Energy entered into a contract whereby WSRC agreed to manage and operate SRS for the Department of Energy. WSRC and PCS in turn entered into several subcontracts whereby PCS agreed to perform employee scheduling and cost-estimating services for WSRC in connection with WSRC's management and operation of SRS.

As previously explained, the subcontracts at issue in the present appeal provided that the final amounts that WSRC owed PCS would be determined through negotiations between the parties after a final audit by WSRC of PCS's accounting books and records. Also as previously explained, the DCAA ultimately completed the final audit of PCS's accounting books and records because of the bad blood that had developed between the parties. The parties never engaged in

final negotiations to resolve the disputed cost elements. Moreover, as stated previously, PCS was not happy when WSRC decided not to continue its contractor/subcontractor relationship with PCS at the expiration of the subcontracts at issue and hired some employees of PCS.

The rancorous relationship between PCS and WSRC ultimately led PCS to file the present diversity action against WSRC in the United States District Court for the Southern District of Georgia. Before any substantive proceedings occurred, the action was transferred to the United States District Court for the District of South Carolina. PCS's complaint alleged the following claims under South Carolina law: (1) breach of third-party beneficiary contract[2]; (2) libel; (3) slander; (4) violations of the South Carolina Unfair Trade Practices Act (SCUTPA), S.C. Code Ann. §§ 39-5-10 to 39-5-160 (Law. Co-op. 1985 & Supp. 2001); (5) breach of contract accompanied by a fraudulent act; (6) breach of the implied duty of good faith and fair dealing; (7) intentional interference with economic relations; (8) intentional interference with prospective contractual relationships; and (9) breach of subcontracts. WSRC filed a single counterclaim alleging breach of subcontracts.

Following the conclusion of discovery, the district court granted WSRC's motion for summary judgment, Fed. R. Civ. P. 56, with respect to PCS's claims alleging breach of third-party beneficiary contract, libel, slander, violations

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[2] This claim involved what the parties refer to as "the Prime Contract," which is the contract between WSRC and the United States Department of Energy regarding WSRC's management and operation of SRS.

of the SCUTPA, and breach of contract accompanied by a fraudulent act. The district court denied WSRC's motion for summary judgment with respect to PCS's remaining claims. The district court then scheduled the remaining claims for a jury trial.

At the close of PCS's evidence at trial, the district court granted WSRC's motion for judgment as a matter of law to the extent that PCS contended that WSRC breached an alleged contractual duty to provide PCS with WSRC personnel for training. The jury found against PCS with respect to its remaining claims alleging breach of the implied duty of good faith and fair dealing, intentional interference with economic relations, intentional interference with prospective contractual relationships, and breach of subcontracts.[3]

Furthermore, as previously stated, the parties agreed to allow the jury to answer the Special Interrogatories regarding the disputed cost elements. Based upon the jury's answers to the Special Interrogatories, the parties agreed that the final amount due PCS under the subcontracts at issue was $252,840.29. This amount was not made part of the final judgment because the jury had been instructed, with the consent of the parties, that: (1) its determinations of the disputed cost elements on the Special Interrogatories does not suggest that it should find for or against either party on any of

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[3] On its own motion, the district court dismissed WSRC's counterclaim because WSRC had abandoned the claim at trial.

the other claims that were the subject of the verdict forms;[4] and (2) the jury returned a verdict finding that WSRC had not breached the subcontracts at issue.

The district court subsequently entered its final judgment dismissing all claims against WSRC with prejudice. The judgment also provided that WSRC "shall recover of the plaintiff its costs of action." (J.A. 2167). The district court left the determination of WSRC's "costs of action" for a later

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[4] In this regard, the district court specifically instructed the jury as follows:

> I want you to understand that your determination of these amounts on the Special Interrogatories does not suggest that you should find for or against either party on any of the other claims, that [are] the subject of the verdict forms. In other words, we have two things you are doing here today. One is you are resolving those unresolved audit issues and you are resolving that irrespective of fault on either side. Then once you have resolved that then you go to the question of whether or not [PCS] has proved the claims that it has brought in the case for breach of contract, breach of implied duty of good faith and fair dealing, and the tortious interference claims. But just because you are determining the amounts that are due and owing under the subcontracts does not imply that you should find for or against either party on those other claims. Those are separate issues.

(J.A. 2074-75).

time, and to this court's knowledge has not made such determination.[5] *Id.*

Following the district court's entry of final judgment in favor of WSRC, PCS moved for a new trial with respect to all claims that were before the jury (Rule 59(a) Motion). Fed. R. Civ. P. 59(a). PCS argued that a new trial should be conducted because the weight of the evidence and the jury's answers to the Special Interrogatories demonstrated liability on the part of WSRC. PCS also rested its Rule 59(a) Motion on allegations that the district court committed various evidentiary errors. The district court denied the motion *in toto*.

In another post-trial motion, PCS moved for modification of the final judgment to reflect: (1) that it prevailed on WSRC's counterclaim; (2) an award of costs in favor of PCS rather than WSRC; and (3) an award of $252,840.29 plus pre and postjudgment interest on that amount. Fed. R. Civ. P. 59(e). The district court denied this motion (the Rule 59(e) Motion) *in toto* as well.

PCS noted a timely appeal. On appeal, PCS challenges the district court's grant of summary judgment in favor of WSRC with respect to its claims alleging breach of third-party beneficiary contract, violations of the South Carolina Unfair Trade Practices Act, and breach of contract accompanied by a fraudulent act. PCS also challenges the district court's grant of judgment as a matter of law with respect to the portion of

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[5] The parties agree that WSRC has paid PCS $252,840.29 less $30,000 that WSRC is withholding pending the district court's determination of its petition for approval of costs.

its breach of subcontracts claim pertaining to WSRC's alleged duty to provide PCS with WSRC personnel for training. Moreover, PCS challenges the district court's denial of its Rule 59(a) Motion and Rule 59(e) Motion.

II.

We first address PCS's contention that the district court erred by granting summary judgment in favor of WSRC with respect to its claim alleging violations by WSRC of the SCUTPA. PCS's contention is without merit.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "We review a grant of summary judgment *de novo*, applying the same standard as the district court." *Baber v. Hospital Corp. of Am.*, 977 F.2d 872, 874 (4th Cir. 1992). In so doing, we view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

The crux of PCS's claim under the SCUTPA is that WSRC allegedly violated the SCUTPA by hiring PCS employees away from PCS, using audit information for improper purposes, and blacklisting PCS from future subcontracting opportunities with WSRC. To maintain a viable claim under the SCUTPA, a plaintiff must prove by a preponderance of the evidence "(1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff

suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest." *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 291 (4th Cir. 1998). South Carolina courts, in addressing the third element of a SCUTPA claim, have examined whether the conduct complained of is capable of repetition. *Noack Enters, Inc. v. Country Corner Interiors*, 351 S.E.2d 347, 350-51 (S.C. Ct. App. 1986).

We agree with the district court that PCS's SCUTPA claim fails for lack of evidence of an adverse impact on any public interest. As the district court aptly stated with regard to this element:

> Plaintiff hangs its hat on the "potential for repetition." It submits that WSRC has numerous subcontractors on site and continues to illegally perform financial audits on small and disadvantaged subcontractors. No evidence supports this claim. This case presents a situation in which two corporations found themselves involved in a business dispute over a contract audit. There is no evidence in the record that WSRC regularly has such disputes with other parties or that what transpired in this case has any real potential for repetition. At best this is a standard contract dispute that falls well outside the ambit of what constitutes an actionable SCUTPA violation. Accordingly, summary judgment is proper as to Count V.(J.A. 607).

Based upon this reasoning of the district court, we affirm the district court's grant of summary judgment in favor of WSRC with respect to PCS's SCUTPA claim.

III.

We next address PCS's contention that the district court erred in excluding evidence that WSRC's auditors who were involved in the initial audit of PCS's accounting books and records were not licensed certified public accountants. PCS sought to introduce this evidence to show that WSRC did not attempt to perform audits of PCS's accounting books and records in accordance with statements "in its audit reports that they were prepared in accordance with Generally Accepted Government Auditing Standards (`GAGAS')." (PCS's Br. at 14). In this regard, PCS relied upon the portion of GAGAS providing that "public accountants engaged to conduct audits should be . . .licensed certified public accountants . . . ." (J.A. 1507).

WSRC had filed a pretrial motion *in limine* seeking to exclude all evidence from trial that GAGAS required auditors to be licensed certified public accountants. The district court granted WSRC's motion *in limine* on the basis that the subcontracts at issue did not require WSRC's auditors to be licensed certified public accountants. The district court also rejected PCS's reading of the auditor licensing provision in the GAGAS. Essentially, the district court's reasoning in this regard went as follows. WSRC's auditors were not "public accountants engaged" to audit PCS. *Id.* Rather, they were WSRC employees exercising WSRC's contractual rights to inspect PCS's accounting books and records. Therefore, the

licensing provision in GAGAS upon which PCS relies was not applicable to WSRC's auditors.

We review a district court's evidentiary rulings for abuse of discretion. *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 126 (4th Cir. 1995). We can find no fault in the reasoning of the district court. Therefore, we hold the district court did not abuse its discretion in excluding evidence that the auditors from WSRC involved in the initial audits of PCS's accounting books and records were not licensed certified public accountants.

IV.

We next address the assignment of error that PCS pressed most vigorously on appeal, namely, that the district court abused its discretion by denying its Rule 59(e) Motion to modify the judgment in order to reflect: (1) an award of $252,840.29 in its favor plus pre and postjudgment interest on that amount; and (2) an award of costs in its favor rather than WSRC. Fed. R. Civ. P. 59(e). PCS argues that such a modification is in order because, in its complaint: (1) it alleged that WSRC was using its failure to properly perform and complete the audit of PCS's accounting books and records as an excuse for not paying it substantial sums of money owed under the subcontracts at issue; (2) it generally requested an award of monetary damages; and (3) it specifically requested an award of prejudgment interest for amounts still owing under the subcontracts. According to PCS, it is inconceivable that the jury could have answered the Special Interrogatories in its favor but found against it on every one of its substantive claims. Thus, as PCS's argument goes, the final judgment, as it now stands, reflects an inconsistency in the jury's verdict;

an inconsistency that can only be corrected by vacating the final judgment and remanding the case to the district court with instructions that the district court grant its Rule 59(e) Motion.

Although Rule 59(e) does not itself provide a standard under which a district court may grant a motion to alter or amend a judgment, we have previously recognized that there are three grounds for modifying an earlier judgment: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997). PCS's Rule 59(e) Motion appears to rely upon this last ground.

Reviewing the district court's denial of PCS's Rule 59(e) Motion for abuse of discretion, *id.*, we find this assignment of error to be without merit. First, the invited error doctrine prevents PCS from relying upon any alleged inconsistency in the jury's verdict in support of its challenge to the district court's denial of its Rule 59(e) Motion. Under the "invited error" doctrine, a party is prevented from inducing the court to take an erroneous step and later seeking redress for the error. *United States v. Jackson*, 124 F.3d 607, 617 (4th Cir. 1997) ("invited error doctrine recognizes that a court cannot be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request") (internal quotation marks omitted). Here, PCS invited the jury's allegedly inconsistent verdict. As the district court reported in its Memorandum Opinion in which it denied PCS's Rule 59(a) Motion and its Rule 59(e) Motion, "both parties agreed that even if there was no breach [of the

subcontracts at issue] by WSRC, outstanding negotiations were required . . . to finalize any amounts due to or from" PCS under the subcontracts at issue. (J.A. 2192). Therefore, with input from and approval of the parties, the district court instructed the jury as follows:

> [Y]our determination of these amounts on the Special Interrogatories does not suggest that you should find for or against either party on any of the other claims, that [are] the subject of the verdict forms. In other words, we have two things you are doing here today. One is you are resolving those unresolved audit issues and you are resolving that irrespective of fault on either side. Then once you have resolved that then you go to the question of whether or not [PCS] has proved the claims that it has brought in the case for breach of contract, breach of implied duty of good faith and fair dealing, and the tortious interference claims. But just because you are determining the amounts that are due and owing under the subcontracts does not imply that you should find for or against either party on those other claims. Those are separate issues.

(J.A. 2074-75).

These jury instructions clearly created the potential for the verdict situation that resulted in this case.[6] Thus, assuming

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[6] Notably, even before this court, PCS expressly states that it "does not attack the jury charges themselves." (PCS's Reply Br.

arguendo that the jury's verdict is inconsistent, such inconsistency was invited by PCS and cannot now be remedied on appeal. Second, as the district court correctly explained, the verdict is not inherently inconsistent. The jury apparently believed that although WSRC owed PCS money under the subcontracts at issue, that fact did not constitute breach of those subcontracts under the circumstances. This finding is plausible given that the subcontracts at issue provided that outstanding negotiations were required to finalize any amounts owed PCS.

PCS's assignment of error in this regard strikes us as PCS wanting to have its cake and eat it to. The district court accommodated PCS's desire to have the jury resolve the disputed cost elements by answering the Special Interrogatories. In order to effectuate this process, PCS also agreed to the jury instruction which made clear that the jury's answers to the Special Interrogatories had no bearing upon its deliberations regarding PCS's substantive claims. PCS now complains that the district court erred by not incorporating the $252,840.29 amount as well as pre and postjudgment interest on that amount as part of the final judgment (not to mention its request that we award it rather than WSRC costs). We think not; PCS having made its bed, it must now lie in it. In sum, we affirm the district court's denial of PCS's Rule 59(e).[7]

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at 11). In fact, PCS admits that the jury instruction quoted above "is not inaccurate." (PCS's Reply Br. at 9).

[7] We have carefully reviewed PCS's remaining assignments of error and find them to be without merit.

V.

In conclusion, we affirm the district court's final judgment *in toto*.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

C/A No. 1:98-3738-22

[FILED AUGUST 17, 2000]

Project Control Services, Inc., *Plaintiff*,	)
v.	)
Westinghouse Savannah River Company, Inc., *Defendant*.	)

ORDER

A hearing was held on all pending motions in Aiken, South Carolina on Thursday, July 27, 2000. At the conclusion of the hearing the court ruled as follows:

WSRC motion to bifurcate trial of counterclaim or to continue (120)

DENIED

WSRC motion for summary judgment as to all claims (122)

GRANTED AS TO COUNTS I, IV, V AND VII

DENIED AS TO COUNTS II, III AND VI

WSRC request to file memorandum appendix under seal (122)

WITHDRAWN

WSRC motion in lirnine to exclude testimony of Plainitff's expert witness (124)

DENIED

PCS motion to seal memorandum and appendices (143)

DEFERRED

PCS motion to exclude testimony of Defendant's expert witness (150)

DENIED

As to the motions requesting that the court seal memoranda and appendices, WSRC withdrew its request that any items be sealed. Counsel for PCS requested that certain salary and overhead information be sealed. Accordingly, the court ordered that PCS identify the specific documents containing such information. The court by a separate order

and notice will resolve this matter in light of the law in this circuit concerning sealing court documents. *Ashcraft v. Conoco, Inc.*, 2000 WL 891017 (4th Cir. July 6, 2000).

As to the motion to bifurcate, the court denied the motion because the court found that a waste of judicial resources would occur were the claims of PCS and the counterclaim of WSRC tried in two separate trials. Counsel for PCS advised that the DCAA audit, which WSRC requires in order to proceed on its counterclaim, is expected to be completed within the next month. The court requested that the parties convey to the DCAA its request that the completion of the audit be expedited (with a final audit report issued in early September) so that the trial may proceed, in full, as scheduled. In addition, PCS was ordered to turn over all DCAA related documents to WSRC by August 3.

As to the motions to exclude testimony by expert witnesses, the court concluded that all three of the challenged experts are sufficiently qualified to testify as experts under F. R. Evid. 702. F.R. Evid. 703 may preclude certain portions of the testimony of the expert, but it is apparent that each expert will be able to testify before the jury. The court, therefore, will conduct a hearing either at the final pretrial conference or during trial as to the specific testimony proposed to be elicited at trial by the party calling the expert. At that hearing the proposed expert will be examined outside the presence of the jury.

Finally, the court granted summary judgment to Defendant WSRC as to Counts I, IV, V and VII of the Amended and Supplemental Verified Complaint(hereafter

ASVC). Summary Judgment was denied as to Counts II, II and VI. The court's reasons follow:

COUNT I - BREACH OF THIRD PARTY BENEFICIARY CONTRACT

The court agrees with the arguments presented by WSRC in its memorandum in support of motion for summary judgment and its reply memorandum as to Count I. The court concludes that PCS was not an intended beneficiary of the contract between DOE and WSRC. Accordingly, summary judgment is appropriate on Count I.

COUNT II - BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

A plaintiff seeking to recover for breach of an implied duty of good faith and fair dealing must prove: 1) existence of a mutually binding contract between plaintiff and defendant; 2) refusal by defendant to perform under the contract, resulting from defendant's bad faith or unreasonable action in breach of the implied covenant of good faith and fair dealing arising on the contract ; and 3) resulting damages to plaintiff. *Crossley v. State Farm,* 415 S.E. 2d 393(S.C. 1992). If these elements are pleaded and proved, plaintiff' s remedy is not limited to the face amount of the contract. However, a plaintiff may not recover on his implied covenant of good faith and fair dealing claim if it was in default on the contract. *Swinton Creek Nursery v. Edisto Farm Credit,* 514 S.E.2d 126 (S.C. 1999).

Here Plaintiff alleges that, "by giving its contract work to a competitor and hiring substantially all of Project

Control's employees for one of the subcontracts, WSRC, along with the other facts as alleged above, has breached this duty of good faith and fair dealing." Moreover, Plaintiff alleges that WSRC "breached this duty with its abuse of the audit process" and "by failing to continue the subcontract beyond the stated termination date of September 30, 1998." (ASVC, paras. 83, 85, 86).

Because this court is required at the Rule 56 stage to view the evidence in the light most favorable to Plaintiff, and resolve all inferences in Plaintiff's favor, Defendant is not entitled to summary judgment on this claim. Plaintiff has come forward with admissible evidence which, if found credible by a jury, would support a claim that Defendant failed to pay invoices during the audit. Failure to pay invoices can support a claim for breach of the implied duty of good faith and fair dealing. Accordingly, summary judgment is denied as to this claim.

COUNT III - INTERFERENCE WITH ECONOMIC RELATIONSHIPS

To establish a claim for intentional interference with economic relationships a plaintiff must prove: 1) the existence of a contract; 2) the wrongdoer's knowledge of the contract; 3) the intentional procurement of its breach; 4) absence of justification; and 5) resulting damages. *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 336 S.E. 2d 472, 473 (S.C. 1985). A claim of intentional interference with prospective contractual relations requires proof of the following: 1) intentional interference with plaintiff's potential contractual relations; 2) for an improper purpose by improper methods; 3) causing injury to the plaintiff. *Love v. Gamble,*

448 S.E. 2d 876, 882 (S.C.Ct. App. 1994). *See also*, *Crandall Corp. v. Navistar,* 395 S.E.2d 179 (S.C. 1990).

Plaintiff alleges that WSRC interfered with its business relations with its employees, with other corporations and with prospective employees. (ASVC, paras. 89, 91 and 93). There are disputed issues of material fact concerning the circumstances under which employees of PCS were hired by WSRC during the term of the PCS subcontract with WSRC. WSRC contends that because the PCS employees were at will employees there can be no claim for intentional interference as a matter of law. However, under South Carolina law, one may not interfere as a matter of malice or spite with an at-will contract. *Waldrep Bros. Beauty Supply v. Wynn Beauty Supply,* 992 F.2d 59 (4th Cir. 1993). Here PCS contends that WSRC's *misuse* of confidential information from the audit enabled WSRC to formulate its plan to hire PCS's employees and do its own project control work. Misuse of inside or confidential information is considered an improper method of competition in an at-will contract situation. *Duggin v. Adams,* 360 S.E.2d 832, 837(Va. 1987), cited with approval in *Crandall Corp. v. Navistar,* 395 S.E. 2d at 180. (In case for intentional interference with an at-will contract, "[i]mproper methods may include ...*misuse* of inside or confidential information...") Therefore, summary judgment as to this claim is not warranted.

COUNT IV - LIBEL AND SLANDER

Plaintiff contends that several representatives of WSRC made false statements concerning overbilling by PCS on the WSRC subcontracts, The complaint alleges that the statements were made despite knowledge of their falsity or

with reckless disregard of their falsity. (ASVC paras.96, 100). It is alleged that these statements were made to DOE personnel and "persons within other corporations." (ASVC para. 97). Finally, it is alleged that these statements prompted DOE to allege overbilling by PCS. (ASVC, para. 98).

WSRC seeks summary judgment as to this count contending that the statements were true and the communications were privileged. The court need not reach the issue of the truth of the statements because there is no evidence that the statements, if false, were made with knowledge of falsity or reckless disregard of their falsity. In fact, PCS has failed to support its contention that the statements that PCS was overbilling WSRC were in fact false. Accordingly, summary judgment is appropriate as to this claim.

COUNT V - VIOLATIONS OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

Plaintiff's Count V alleges that WSRC violated the South Carolina Unfair Trade Practices Act (SCUTPA), S.C. Code § 39-5-10 et seq., by its actions in hiring away PCS employees, causing cancellation of PCS contracts with other corporations, using audit information for improper purposes and improperly disseminating audit information. (ASVC, paras. 104, 105, 106). In addition, Plaintiff contends that WSRC blacklisted PCS without the knowledge of PCS. (ASVC, para. 107). Plaintiff claims that these actions of WSRC constitute unfair competition in violation of SCUTPA.

To maintain a viable claim under SCUTPA, a plaintiff must show "(1) that the defendant engaged in an unlawful

trade practice, (2) that Plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest." *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283,291 (4th Cir. 1998). South Carolina courts, in addressing the third element of a SCUTPA claim, have examined whether the conduct complained of is capable of repetition. *Noack Enters, Inc. v. Country Corner Interiors,* 351 S.E. 2d 347,351 (S.C. App. 1986).

The third element of this cause of action is dispositive here. As this court has previously observed, the adverse impact on the pubic interest by a defendant's alleged unfair trade practice must be proven with specific facts showing that members of the public were adversely affected. *The Wilson Group, Inc. v. Quorum Health Resources, Inc.*, 880 F. Supp. 416, 426 (D.S.C. 1995) (citing *Daisy Outdoor Advertising Co. v. Abbott,* 451 S.E. 2d 394,397 (S.C. Ct. App. 1994), aff'd in part and rev'd in part. 473 S.E. 2d 47 (S.C. 1996) and *Jeffries v. Phillips*. 451 S.E.2d 21.23 (S.C. Ct. App. 1994)). *See also Columbia East Assoc. v. Bi-Lo, Inc.*, 386 S.E. 2d 259, 263 (S.C.Ct.App. 1989)(deliberate or intentional breach of contract does not violate SCUTPA). Even a fraud between two parties, without an attendant public impact, does not serve as a basis for a viable SCUTPA claim. *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising,* 974 F.2d 502,507 (4th Cir. 1992).

Plaintiff hangs its hat on the "potential for repetition." It submits that WSRC has numerous subcontractors on site and continues to illegally perform financial audits on small and disadvantaged subcontractors. No evidence supports this

claim. This case presents a situation in which two corporations found themselves involved in a business dispute over a contract audit. There is no evidence in the record that WSRC regularly has such disputes with other parties or that what transpired in this case has any real potential for repetition.. At best this is a standard contract dispute that falls well outside the ambit of what constitutes an actionable SCUTPA violation. Accordingly, summary judgment is proper as to Count V.

COUNT VI - BREACH OF SUBCONTRACT

Plaintiff alleges WSRC breached its subcontracts by utilizing the audit process to gain access to confidential information used to hire PCS employees and failing to pay invoices. Because there are disputed issues of material fact as to use of confidential information and the hiring of PCS employees and because there are disputed material facts concerning whether certain proper invoices were not paid during the pendency of the audit, summary judgment is denied as to this claim.

COUNT VII - BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT

To establish a viable claim for breach of contract accompanied by a fraudulent act, Plaintiff must prove three elements: (1) a breach of contract; (2) fraudulent intent relating to the breach of the contract; and (3) a fraudulent act accompanyin$_8$ the breach. *Floyd v. Country Squire Mobile Homes,* 336 S.E.2d 502, 503-504(S.C. Ct. App. 1985). A "mere breach of a contract, even if willful or with fraudulent purpose, is not sufficient to entitle a Plaintiff to go to the jury

on the issue of punitive damages." *Lister v. Nationsbank,* 494 S.E. 2d 449, 454 (S.C. Ct. App. 1997) "Absent a 'fraudulent act accompanying the breach,' there can be no recovery for punitive damages." *Id.* The fraudulent act must be "connected with the breach itself and cannot be too remote in either time or character." Floyd, 336 S.E. 2d at 503-504. As noted, the purpose of a claim for"breach of contract accompanied by a fraudulent act" is to obtain punitive damages. To recover such damages, Plaintiff has the burden of proving, by clear and convincing evidence, that the defendant's conduct was willful, wanton, or in reckless disregard of Plaintiff's rights. *Lister,* 494 S.E. 2d at 458, S.C. Code Ann. § 15-33-135.

As set forth above, this is a contract dispute in which Plaintiff contends that WSRC performed an improper audit and misused the information from the audit to hire away PCS' employees and not renew PCS' subcontracts. PCS also contends that WSRC failed to pay invoices it was required under the subcontract to pay. While there are disputed issues of material fact which preclude summary judgment on Counts II, III and VI, there is simply no support for Plaintiff's claim of a fraudulent act accompanying the breach. Accordingly, summary judgment is appropriate as to Count VII.

Based on the foregoing, the motion for summary judgment of WSRC is *granted* as to Counts I, IV, V, and VII. It is *denied as* to Counts II, III and VI.

SO ORDERED.

Florence, South Carolina August 16th, 2000

/s/_____
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Civil Action No: 1:98-3738-22

[Filed May 15, 2000]

Project Control Services, Inc.	)
Plaintiff,	)
v.	)
	)
Westinghouse Savannah River Company,	)
Defendant.	)
	)

WESTINGHOUSE SAVANNAH RIVER COMPANY'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO ALL CLAIMS

* * *

[p.20]

Contract provides for liquidated damages to DOE and not any third party. PCS has no stated or implied rights to performance or damages.

2. FEDERAL LAW FOR DETERMINING INTENDED BENEFICIARY.

Federal authority places a high standard on a party claiming rights of an intended third-party beneficiary to a federal government contract: "Third-party beneficiary status has been characterized as an 'exceptional privilege' ... [t]hus, demonstration of such status is an onerous *burden.*" *Nat'l Surety Corp. v. United States*, 118 F.3d 1542, 1549 (Fed. Cir. 1997).

The critical question is whether PCS is an intended or incidental beneficiary to the Prime Contract. An incidental beneficiary cannot enforce a contract to which it is not a party.

In *Sallee v. United States*, 41 Fed. Cl. 509, (1998) the Court of Claims determined that a WSRC employee was not a third-party beneficiary under the then-existing Prime Contract with DOE containing a provision for cost reduction proposals and incentive fees. Sallee's cost reduction proposal had been rejected by DOE. Sallee sought third-party beneficiary status under WSRC's Prime Contract with DOE, claiming that his proposal was arbitrarily and capriciously rejected under the standard set forth in the Prime Contract, and further claimed that DOE had breached an implied covenant of good faith and fair dealing in failing to give "fair consideration" to his rejected proposal. Sallee argued he had a right to enforce that provision of the Prime Contract. The court disagreed. Cost reduction program requirements for setting aside 10% of cost savings for employee incentive programs which were explicitly left up to WSRC, did not give

Sallee third-party beneficiary status under the Prime Contract. *Sallee vs. United States*, *supra*, 41 Fed. Cl. at 514.

Like Sallee, PCS' claim to a program under the current Prime Contract fails. At most, PCS is an incidental beneficiary of the Prime Contract and not able to seek redress even if WSRC had breached this provision of the contract - which it has not. In determining whether one is an intended beneficiary, entitled to enforce a third-party contract; or merely an incidental beneficiary, who cannot enforce such a contract, federal authorities have looked to the Restatement of Contracts for guidance and observed that where a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from the performance or failure to perform unless (a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of law authorizing the contract and prescribing remedies for its breach. *Orchards v. United States*, 4 Cl. Ct. 601,611, aff'd 749 F.2d 1571 (Fed. Cir. 1984) *cert. denied*, 474 U.S. 818 (1985), *citing* with approval Restatement (Second) of Contracts § 313(2). The rationale for this rule is that government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested. In case of doubt, a promise to do an act for or render a service to the public does not have the effect of a promise to pay consequential damages to individual members of the public. *Id* In *Orchards*, the United States Bureau of Reclamation had established contracts with various irrigation districts. Farmers

who were members of one district asserted that the Bureau had breached a contractual duty to provide accurate water supply projections. The *Orchards* court held that the Plaintiffs failed to qualify as third-party beneficiaries because neither party to the contract intended that specific individuals within the district could maintain an action for breach.

In *Baudier Marine Electronics v. United States*, 6 Cl. Ct. 246, 249 (1984) a two-part test for defining whether a claimant is intended or incidental was established. The contract must (1) reflect the intent to benefit the third party, and (2) give the third-party the direct right to compensation or to enforce that right against the promisor. *Id.* (PCS would quickly fail part two of this test.)

Schuerman v. United States, 30 Fed. Cl. 420 (1994) focused on the intent to benefit aspect of the test as the determining factor. In *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997), the Federal Circuit adopted the intent to benefit test as well. The Montana court held that the appropriate test for intended third-party beneficiary stares is that "the contract must 'reflect the express or implied intention of the parties to benefit the third-party.'" *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997).

The Court of Appeals for the District of Columbia also employs a test of intent only. "[O]ur interpretation ... accords with the basic contract principle that third party beneficiaries of a Government contract are generally assumed to be merely incidental beneficiaries, and may not enforce the contract absent *clear intent to the contrary.*'" *Beckett v. AirLine Pilots Association*, 995 F.2d 280 (D.C. Cir. 1993), *citing*

Restatement (Second) of Contracts, § 313(2) & cmt. a. [Emphasis added.]

One case applying the clear intent rule is *Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 440 S.E.2d (Ct. App. 1994). Banks entered into a contract with the South Carolina Highway Department to build a portion of the Mark Clark Expressway. Clearing and grubbing work was subcontracted to Hammond. As part of the subcontract compensation, Hammond was to take ownership of a bank building that had to be removed from the property. After execution of both the prime and subcontracts, the Highway Department decided not to demolish the building, and deleted that portion of the contract. Hammond sued.

The court held that Hammond was no more than an incidental beneficiary as it "failed to introduce any evidence showing the Highway Department and Banks entered into their contract to *directly benefit* Hammond." *Id.* at SC 423, S.E.2d 892. The mere fact that Hammond could ultimately and indirectly benefit was not sufficient to establish third-party beneficiary status.

See also, TCX, Inc. v. Commonwealth Land Title Ins. Co., 928 F. Supp. 618, 623 (D.S.C. 1995) ["In the absence of a clear intent to benefit the third person, he cannot sue on the contract."]

3. AS APPLIED.

Applying this precedent, PCS cannot maintain that it was intended to be a beneficiary of the WSRC and DOE

Prime Contract provision regarding small business goals. DOE approves these small business goals as provided by the Prime Contract. A review of these clauses clearly shows that they apply by their terms to the subcontracts which are awarded by the M&O contractor. The subcontracting "goals" apply to planned subcontracting dollars only and they do not require that any subcontracting actually take place. However, if subcontracting does occur, the goals as set forth become applicable to review WSRC's actions concerning its awards to small businesses.

PCS is apparently claiming that WSRC is required to award it subcontracts as a result of these small business goal provisions in the Prime Contract. Such a strained reading of these provisions is absurd and unfounded from even a cursory review of these provisions of the Prime Contract.

The Montana court suggested one way to ascertain intent is to determine whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him. *Montana v. United States*, *supra*, 124 F.3d at 1273 - 1274, n. 7. Citing Restatement (Second) of Contracts § 302(1)(b) cmt. d.

PCS' President made it clear that she did not rely on any WSRC- DOE Prime Contract to form or continue her company.[16] Furthermore, it would have been unreasonable

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[16] (A. Peel, v.3, pp. 85-87.)
Q .... Did you form your company because you wanted to start your own company? That was the reason why you formed your company?
A. That is why I formed my own company.

todo so. The DOE-WSRC contract defines women-owned small businesses as only one of three groups, PCS is among an unascertainable number of companies that may qualify as part of a socio-economic group. Also the "promise" is in the form of "goals" established by DOE for the small business subcontracting plan. The promise is only to make a good faith effort to place a certain percentage of the total subcontracts that WSRC awards; but not with any particular small business.

Finally, the WSRC Prime Contract provides for liquidated damages to DOE if WSRC willfully fails to make

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Q. Okay. It was not because of WSRC, was it?
A. No, [didn't set out to market to WSRC. Is that what you're saying? I did not form a company because WSRC had a prime contract with the government. I don't think that's relative.
Q. Okay. And you haven't remained in *business* because WSRC has a prime contract with the government, right?
A. I don't see the significance but no, I -
Q. Well, no, just answer the question, though, as far as-you didn't continue in business just because WSRC has a contract with DOE?
A. No, that was not the reason I'm continuing in business, no.
Q. Okay. And as far as being a-just because somebody is a small business doesn't automatically get them work at WSRC, does it?
A. Of course not.
Q. Okay. They've got to be competent?
A. Qualified.
Q. And you're not saying that just because a person is a small business that they're just entitled to get contracts?
A. Of course no. I don't believe that.
Q. All right. And the same is true for a small woman-owned business, right?
A. Exactly.

a "good faith effort" with the DOE small business goals. The provision does not provide for a payment of any kind by WSRC to any small business for a willful failure to comply with these goals.

It is clear that the small business provisions of WSRC's Prime Contract do not require that WSRC award subcontracts, much less award subcontracts to a specific company such as PCS. Like the cost reduction program analyzed in Sallee, no reasonable person could believe that the Prime Contract was conferring a right upon the Plaintiff here. Particularly when PCS' own President understood that her company's status as a woman-owned business did not give her the right to receive any subcontracts.

Based upon the analysis of the federal and analogous state authority, PCS is not entitled to enforce the Prime Contract Small Business Provisions. Furthermore, WSRC has complied with these goals and, therefore, PCS cannot prove any breach, even if it was entitled to assert third-party beneficiary status.

E. BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

(COMPL., COUNT II)

The subcontracts between WSRC and PCS contain specific starting and ending periods. Where the terms of a contract are clear and unambiguous, the construction of the contract is a matter of law for the court. *Proffit v. Sitton*, *supra* and *F.D.I.C. v. Prince George Corp.*, *supra*, 224 S.C. 206, 136 S.E.2d 257 (1964).

Moreover, a party is entitled to enforce a contract according to its terms. *See*, *Kham & Nates Shoes II, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990). "Although courts often refer to the obligation of good faith that exists in every contractual relation...this is not an invitation to the Court to decide whether one party ought to have exercised privileges expressly reserved in the document". *Id.* 908 F.2d at 1357; *First Federal Savings & Loan Association of South Carolina v. Dangerfield*, 307 S.C. 260, 414 S.E.2d 590, 594 (Ct. App. 1992) ["There is no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him the right to do."]

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